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IN THE

Supreme Court of the United States

No. 74-1226

ROYCE AND MAMIE MCBETH

versus

UNITED PRESS INTERNATIONAL, INC.

PETITION FOR WRIT OF CERTIORARI TO
REVIEW THE DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DONALD V. ORGAN
427 Gravier Street
New Orleans, Louisiana 70130

INDEX

	Page
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	15
Appendix A	17
Appendix B	22

TABLE OF AUTHORITIES

CASES

Page

Barnhill v. Times Picayune Publishing Co., 131, So. 21, 171 La. 286 (La. 1930) 9

Blanchard v. Brawley, 75 So. 2d. 891 (La. App. 1954) 10

Conley v. Gibson, 355, U.S. 41, 78 S.Ct. 99, 2 L. Ed. 2d. 80 (1957) 6

Continental Collieries v. Shober, 130 F. 2d. 631 (3 Cir. 1942) 8

Control Data Corp. v. I.B.M., 421 F. 2d. 323 (8 Cir. 1970) 7

Covington v. Roberson, 111 La. 326, 35 So. 586 10

Dioguardi v. Durning, 139 F. 2d. 774 (2 Cir. 1944) 7

Erie R.R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S.Ct. 817 4

Franigan v. Nicholson Publishing Co., 137 La. 588, 68 So. 964 10

Gertz v. Robert Welch, Inc., ___U.S.___, 41 L.Ed. 2d. 789, 9___ S.Ct. ____ (1974) 12, 14

Great A&P Tea Co. v. Amalgamated Meat Cutters, et al, 410 F. 2d. 650 (8 Cir. 1969) 7

Hall v. Ewing, 140 La. 908, 74 So. 190 10

TABLE OF AUTHORITIES (Continued)

Page

Hanna v. Plumer, 380 U.S. 460, 14 L.Ed. 2d. 8, 85 S.Ct. 1136 (1965) 4

Jozsa v. Maroney, 125 La. 813, 51 So. 908, 27 L.R.A. N.S. 1041, 19 Ann. Cas. 1193. 10

Leimer v. State Mutual Life Assurance Co. of Worcester, Mass. 108 F. 2d. 302, (8 Cir. 1940) 7

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1965). 13

Rosenbloom v. Metromedia, 403 U.S. 291, 91 S.Ct. 1811 (1971). 13

Santana v. Item Co., 189 So. 442, (La. 1929) 10

Smith v. Lyons, 142 La. 975, 77 So. 896 (1917). 9

Springfield Television Inc. v. City of Springfield, Mo. 428 F.2d. 1375 (8 Cir. 1970). 7

Upton v. Times-Democrat Publishing Co., 28 So. 970, 104 La. 141 (La 1900). 9

Vaccario v. Favrot, 120 So. 284, 170 La., 483, affirming 125 So. 296, 13 La. App. 120 (1929). 5

Washington-Youree Hotel Co. v. Union Indemnity Co., 146 So. 342 (La. App. 1933). 5

Weil v. Israel, 42 La. Ann. 962. 10

TABLE OF AUTHORITIES (Continued)

Page

West Carroll Nat'l Bank of Oakgrove v. West Carroll Parish School Board, 136 So. 2d. 699 (La. App. 1962). 5

SECONDARY AUTHORITIES

33 *Am. Jur.* 2d., 314 12

53 *C.J.S.* Section 1, p. 32 12

STATUTES

Article 854 of the La. Code of Civil Precedure. 5

Article 891 of the La. Code of Civil Procedure. 5

Article 2315 of the Civil Code of Louisiana. 8

Rule 8 (a) (2) of the Federal Rules of Civil Procedure 6

28 U.S.C., Sec. 1254 2

IN THE

SUPREME COURT OF THE UNITED STATES

No.

ROYCE AND MAMIE MCBETH

versus

UNITED PRESS INTERNATIONAL, INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Royce and Mamie McBeth, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 30, 1974.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "A", is reported at 505 F.2d. 959.

A copy of the judgment and mandate is printed in Appendix "B".

JURISDICTION

The statutory provision which confers jurisdiction on the Supreme Court is found in 28 U.S.C.A. Section 1254 (i) which states:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendtion of judgment or decree."

QUESTIONS PRESENTED

The following questions are presented for review:

(1) Whether the Court of Appeals erred in holding that a plaintiff must plead "malice" in a federal libel case as is required by the procedural laws of Louisiana? It is petitioners' contention that requiring the plaintiffs below to plead malice binds petitioners herein to the strict "fact pleading" requirements of the State of Louisiana as opposed to the more liberal "notice pleading" practices of the federal courts. Furthermore, since, as will be seen below, the federal courts are authorized to use the federal rules, the Court of Appeals erred in holding petitioners to the strict standards of Louisiana's "fact pleading."

(2) Whether the Court of Appeals erred in holding that defamation is personal to the deceased party defamed post mortem under the laws of Louisiana, and hence, that petitioners' complaint was subject to dismissal. The basis for the Court of Appeals' decision is founded in Louisiana law, and petitioners respectfully submit that the Court of Appeals has misinterpreted the law of the State of Louisiana.

STATEMENT OF THE CASE

United Press International, Inc., hereinafter referred to as U.P.I., on or after November 29, 1972, published on its wire service a statement that Jannas McBeth, one of the women who jumped to her death from the Rault Center fire on November 29, 1972 was seven months pregnant at the time of said fire and her death. This was false. Jannas McBeth was not pregnant, nor was she married. She had been married, but was single at the time of the fire and her death. She was survived by a 14 year old son. This publication was further broadcast in, among other newspaper outlets, the *Mobile Press Register* and caused great anguish, humiliation and embarassment to the minor and surviving parents because of the implication therein that his mother was pregnant and unwed. This suit was for damages suffered by the minor, Victor R. Vince, and for damages to the good name of the deceased and in favor of her succession. The District Court granted respondent's motion for summary judgment dismissing the case. On appeal, the Court of Appeals of the Fifth Circuit affirmed the District Court, and held as follows:

(1) That under Louisiana law, a defamation action does not survive the decedent's estate;

(2) That the complaint was properly dismissed from the District Court for failure to allege malice;

(3) That the action was properly dismissed in the District Court as to the minor son because the tort action of defamation was personal to the party defamed.

Jurisdiction was based in the District Court on diversity of citizenship.

REASONS FOR GRANTING WRIT

In the landmark case of *Hanna v. Plumer*, 380 U.S. 460, 14 L. Ed. 2d, 8, 85 S.Ct. 1136 (1965), this court, following the command of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, decided that federal courts sitting in diversity cases are bound to apply state substantive law and federal procedural rules. Quoting from the opinion:

> "It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. Further they were designed to control very different sorts of decisions. When a situation is covered by one of the federal rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed *to apply the federal rule*, and can refuse to do so only if the Advisory Committee, this court, and the Congress erred in their prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor constitutional restriction." (emphasis added)

Since federal courts are to apply the Federal Rules of Civil Procedure, petitioners respectfully submit that the Court of Appeals of the Fifth Circuit has erred in that they have required petitioners to allege malice as is required by Louisiana Civil Procedure. There is specific language in the opinion which demonstrates this error. Quoting from the opinion:

> "However, that complaint fails to *allege malice* . . . However, where the allegedly defamatory statements are not libelous or slanderous per se,

> Louisiana courts require an *allegation of malice* . . . failure to *allege malice* is not the only barrier to the cause of action on behalf of Victor R. Vince." (emphasis added)

Petitioners submit that requiring the petitioners to allege malice can only be justified on the basis of an application of Louisiana's "fact pleading system". That is, under Louisiana law the pleader, in stating a cause of action, must allege specific facts to support a cause of action. *Vaccario v. Favrot*, 120 So. 284, 170 La. 483, affirming 125 So. 296, 13 La. App. 120 (1929); *Washington-Youree Hotel Co. v. Union Indemn. Co.*, 146 So. 342, (La. App. 1933); *West Carroll Nat'l Bank of Oakgrove v. West Carroll Parish School Board*, 136 So. 2d. 699, (La. App. 1962).

Articles 891 and 854 of the Louisiana Code of Civil Procedure are the relevant sections of statutory Louisiana law that show the need to allege facts in a complaint. Article 854 reads as follows:

> "*All allegations of fact* of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances." (emphasis added)

Article 891 states:

> "The petition shall comply with Articles 853, 854, and 863, and, whenever applicable, with Articles 855 through 861. It shall set forth the name, surname, and domicile of the parties; shall contain a short, clear, and concise statement of the object of the demand and of the *material facts* upon which the cause of action is based; and shall conclude with a prayer for judgment for the relief

> sought. Relief may be prayed for in the alternative." (emphasis added)

In federal practice, however, a complaint need only supply an opponent with "notice" of the claim. Rule 8(a)(2) of the Federal Rules of Civil Procedure is the applicable rule. It reads as follows:

> "A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third party claim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief."

In applying this rule, the federal Courts of Appeals, as well as this Honorable Court, have consistently held that Federal Rule 8(a)(2) does not require a claimant to set out in detail the facts upon which he bases his claim, but require only a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d. 80, 85, 86 (1957) a landmark decision as to dismissal-on-the-pleadings, this court noted:

> "The respondents also argue that the complaint failed to set forth *specific facts* to support its general allegations of discrimination in that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is 'a short and plain statement of the claim' that will give the defendant *fair notice* of what the plaintiff's claim is and the grounds on which it rests. . .

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that purpose of pleading is to facilitate a proper decision on the merits."

In their decisions, the Court of Appeals have also supported this notion that "notice pleading" is to be employed in the federal courts. In *Dioguardi v. Durning*, 139 F. 2d. 774, 775 (2 Cir. 1944) the court noted:

> "Under the new Rules of Civil Procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action' but only that there be a 'short and plain statement of the claim showing that the pleader is entitled to relief.' "

In *Leimer v. State Mutual Life Assurance Co. of Worcester, Mass.*, 108 Fed. 2d. 302, 306 (8 Cir. 1940), the court noted:

> "No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint. It will not do to circumvent a determination of a suit upon the merits by accepting an assertion that the claim stated in the complaint is groundless."

Other decisions on this point of law include *Springfield Television, Inc. v. City of Springfield, Mo.*, 428 F. 2d. 1375, 1381 (8 Cir. 1970); *Control Data Corp. v. Intern'l Business Machines*, 421 F. 2d. 323, 326 (8 Cir. 1970); *Great A&P Tea Co. v. Amalgamated Meat Cutters, et al*, 410 F.

2d. 650, 652 (8 Cir. 1969); *Continental Collieries, Inc. v. Shober*, 130 F. 2d. 631, (3 Cir. 1942).

The petitioners' original complaint in the District Court alleged "neglect, inattention and carelessness," as opposed to "malice". Under the notice pleading system of the federal courts, such an allegation provided the respondent with sufficient notice of petitioners' cause of action. Petitioners respectfully submit that the District Court and the Court of Appeals erred in dismissing petitioners' cause of action on the grounds of a failure to allege malice.

ISSUE 2

U.P.I. urged, by way of a motion for summary judgment in the District Court, that Louisiana does not grant a surviving family member, relative or estate of the deceased a cause of action for the defamation of a person already deceased.

The factual basis of this claim is apparently that Jannas McBeth was deceased prior to the transmission of the false statement by the defendant wire service. That defense is without merit.

Louisiana Civil Code Article 2315, the fountainhead of Louisiana tort law, provides:

> "Every act whatever of a man that causes damages to another obliges him by whose fault it happened to repair."

It has long been recognized that defamation by libel and slander is an actionable cause under this article; thus, defamation is recognized in the interpretation of Article 2315 as an act that causes injury for which damages are

recoverable. In the case of *Smith v. Lyons*, 142 La. 975, 77 So. 896, (1917) the Supreme Court of Louisiana defined libel:

> "Libel is a malicious publication, expressed either in printing or writing or by signs or pictures tending to either *blacken the memory of one dead* or the reputation of one who is alive, in exposing him to public hatred contempt, or ridicule." (emphasis added)

The Louisiana Supreme Court has further defined the standard essential for recovery under Article 2315 in cases of libel. In the case of *Upton v. Times-Democrat Publishing Co.* 28 So. 970, 104 La. 141, the court stated:

> ". . . Injury resulting from oversight or negligence, even when there is no malice or evil intent, may give rise to liability and damages. A newspaper would yet be libel if an injurious untruth should find its way into its columns, though by the merest accident. The law seeks to protect the innocent who has been injured by libelous report." 104 La. 146.

In the case of *Barnhill v. Times-Picayune Publishing Co.* 131 So. 21, 171 La. 286, the Louisiana Supreme Court dealt with the legal definition of malice. It said:

> "The facts of the case show a total absence of malice or ill will on the part of the respondent in publishing the article in question. . . However, this state of facts does not wholly exonerate respondent from all liability. . . Plaintiff may recover compensatory damages regardless of whether there was any actual malice or not. The malice imputed to a publisher of a libel is not personal ill will, but merely imputed from willfully and wantonly doing an unlawful act which

> results in injuries. *Weil v. Israel*, 42 La. Ann. 962, 827, 826; *Covington v. Roberson*, 111 La. 326, 35 So. 586; *Hall v. Ewing*, 140 La. 908, 74 So. 190, *Franigan v. Nicholson Publishing Co.*, 137 La. 588, 68 So. 964."

In *Santana v. Item Co.*, 189 So. 442, (La. 1939) a libel case, the Supreme Court of the State of Louisiana noted:

> "Mental suffering alone can be made the basis for damages. *Jozsa v. Maroney*, 125 La. 813, 51 So. 908, 27 LR.A.N.S., 1041, 19 Ann. Cas. 1193."

The fact that Louisiana protects mental anguish of surviving relatives is demonstrated by the decision of the Louisiana appellate court in the case of *Blanchard v. Brawley*, 75. So. 2d. 891 (La. App. 1954). In that case, the complaining kinsman alleged that Blanchard, the deceased, while driving a Chevrolet truck with a semi trailer loaded with logs lost control when the right front tire of the truck blew out causing the truck to turn over pinning Blanchard in the cab and causing his death. Gasoline from the tank and carburator spilled around the cab and body of the truck. Employees of defendant wrecker service lit an acetylene blow torch to cut a chain binding the logs for the purpose of removing the logs from the cab in order to permit extrication of the decedent's body. The gasoline ignited by the torch, starting a fire which burned Blanchard's body so badly that the casket containing it was kept closed at the home and was not opened during the wake. A suit was brought by the mother, brother and the sister. It was not with an exception of no cause or right of action. The appellate court said:

> "We feel that the petitioners have alleged a cause of action under the provisions of Article 2315. . . Although the jurisprudence of the state is to the

> effect that one may not recover damages for mental pain and anguish resulting from the physical damage to a third party, it is clear that the cause before us will not come under the said doctrine. . . Petitioner's petition is for mental anguish and the anguish caused by the mutilation of the dead body of a near relative. . ."

The Court went on to say:

> "True, the courts of this state have not been previously presented with a claim for damages for mental anguish resulting from the mutilation of the corpse. However, the courts of this state have recognized the claim for damages for mental anguish, humiliation, and embarassment. In *Humphrey v. Bennett Oil Co.*, 195 La. 531, 197 So. 222, 224, our Supreme Court awarded damages for the mental pain and anguish suffered by the petitioners as the result of the desecration of a cemetary where a close relative was buried. In that case the Court said:
>
> > 'This court has repeatedly held that an action lies to recover damages for mental anguish, pain and suffering caused by the fault of another, and that damages may be assessed without calculating altogether on the pecuniary loss or the privation of pecuniary gain to the party.' "

It is clear that Louisiana courts give the broadest type of protection for claims of mental anguish. It would be incongruous for Louisiana to grant the surviving relatives a cause of action for mental anguish for an assault or injury committed upon the lifeless body of a deceased, and at the same time denying those same relatives a cause of action for damage to the memory and good character of that same deceased.

Finally, 33 Am. Jur. 2d. 314, 315, comments on libel of deceased persons as follows:

> "In most jurisdictions, either under the common law or by virtue of statute, it constitutes an offense to blacken or vilify the memory of the deceased person."

In 53 C.J.S. Section 1, page 32 the same subject is dealt with as follows:

> "A definition of 'libel', which is frequently met with approval is as follows: a libel is the malicious publication, expressed either in printing or writing or by signs or pictures, tending to *either blacken the memory of one dead* or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." (emphasis added)

Consequently, it is abundantly clear that the state of Louisiana provides a cause of action in cases within the factual framework of the instant case.

Petitioners respectfully submit that a recent case decided by this Honorable Court also bears consideration herein. In *Gertz v. Robert Welch, Inc.*, ____ U.S. ____ 41 L.Ed. 2d. 789, 9__ S.Ct. (1974), decided after the judgment in this case was rendered and the appeal taken, this Court set forth the applicable law which was basically the same as petitioners argued and briefed to the District Court on the hearing of this case. This Court said:

> ". . . There is no constitutional value in false statements of fact. Neither the intentional lie or the careless error materially advances society's interest in 'uninhibited, robust and wide open debate' on public issues." (____ U.S. ____, 41 L.Ed. 2d. 789, 805, 9 ____ S.Ct. ____)

Apparently accepting that truism as a legitimate basis with which to judge the availability of a first amendment defense, the Court defined the issue as follows:

> "The principal issue in this case is whether a newspaper or publisher that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements" (____ U.S. ____, 41 L.Ed. 2d. 789, 801 9__S.Ct. ____)

This court said:

> ". . . private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.
>
> For these reasons we conclude that the state should retain substantial latitude in their efforts to enforce a legal remedy for the defamatory falsehood injurious to the reputation of the private individual. The extension of the New York Times[1] test proposed by the Rosenbloom[2] plurality would abridge this legitimate state interest to a degree that we find unacceptable. (____ U.S. ____, 41 L.Ed. 2d. 789, 808 9____S.Ct.____)

This court held:

> "We hold that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster for defamatory falsehoods injurious to a private individual." (____ U.S.____, 41 L.Ed. 2d. 789, 809, 9____S.Ct. ____)

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[1] New York Times Co. v. Sullivan, 376 U.S. 254.
[2] Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

In this case U.P.I. did not contend Jannas McBeth was anything other than a private individual, and indeed, in the District Court there was no evidence either alleged or in U.P.I.'s statement of facts or the opposing statement of facts upon which one could legitimately assert that she was anything else.

This Court sets forth the allowable area of recovery in those matters which are not constitutionally protected. It said:

> ". . . We endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury." (_____ U.S. _____, 41 L.Ed. 2d. 789, 810, 9_____ S.Ct. _____.)

Defining actual injury this Court said:

> "Suffice it to say that actual injury is not limited to out of pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." (_____ U.S. _____, 41. L.Ed. 2d. 789, 811, 9 _____ S.Ct. _____.)

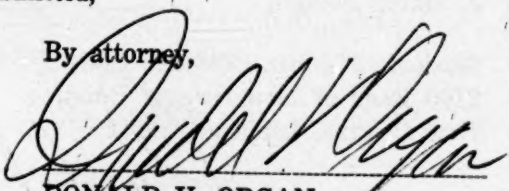
Consequently, the *Gertz* case abridges any Constitutional shield U.P.I. might attempt to raise herein; that is, that the matters published were matters of public interest, and hence, that recovery herein is precluded.

CONCLUSION

The motion for summary judgment in the District Court was ill-founded and should have been denied. Furthermore, the Court of Appeals, erred in holding that (1) petitioners must allege malice as required by Louisiana Civil Procedure, and (2) that petitioners herein did not state a cause of action for defamation under the law of Louisiana.

Respectfully submitted,

By attorney,



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PROOF OF SERVICE

I, Donald V. Organ, attorney for petitioners and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing application for writs on:

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J. David Forsyth

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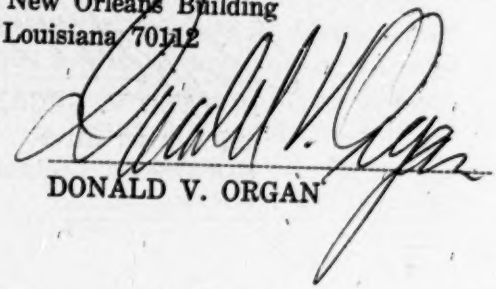

DONALD V. ORGAN

APPENDIX "A"

McBETH v. UNITED PRESS INTERNATIONAL, INC.

Cite as 505 F.2d 959 (1974)

Royce and Mamie McBETH, Plaintiffs-Appellants,

v.

UNITED PRESS INTERNATIONAL, INC.,
Defendant-Appellee.

No. 74-2359

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

Dec. 30, 1974.

Action was brought against newspaper wire service by decedent's father as administrator of her estate and by decedent's parents on behalf of decedent's minor son to recover for alleged defamation of decedent in a newspaper article which falsely described decedent as being pregnant at the time she leaped to her death in order to avoid a fire. The United States District Court for the Eastern District of Louisiana, Herbert W. Christenberry, J., dismissed the complaint as to both causes of action and the plaintiffs appealed. The Court of Appeals held that under Louisiana law, the defamation action did not survive to the decedent's

* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

estate; that the complaint was properly dismissed for failure to allege malice; and that the action was properly dismissed as to the minor son because the tort action of defamation was personal to the party defamed.

Affirmed.

1. Libel and Slander—72

Under Louisiana law, defamation action did not survive to estate of decedent who was allegedly defamed by newspaper wire service. LSA—C.C. art. 2315.

2. Libel and Slander—101(1)

Under Louisiana law, the plaintiff in defamation action must establish four elements in order to prevail: (1) publication; (2) falsity; (3) actual or implied malice; (4) injury.

3. Federal Civil Procedure—1835

On motion to dismiss, the allegations in the complaint must be taken as true.

4. Pleadings—42

Under Louisiana law, doubts about the complaint are resolved in favor of trial on the merits.

5. Libel and Slander—83

Under Louisiana law, where allegedly defamatory statements are not libelous or slanderous per se, there must be an allegation of malice.

6. Libel and Slander—73

Under Louisiana law, the tort action of defamation is

personal to the party defamed and, generally, a person may not recover for a defamatory statement made about another, even if the statement indirectly inflicts some injury upon the person.

7. Libel and Slander—73

Under Louisiana law, where newspaper wire service story which stated that decedent, who jumped to her death in an attempt to avoid a fire, was pregnant made no mention of decedent's infant son, the infant son was not entitled to recover for the false statement concerning decedent's pregnancy.

Donald V. Organ, New Orleans, La., for plaintiffs-appellants.

Robert E. Winn, New Orleans, La., for defendant-appellee.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

Jannas Geneva McBeth died on November 29, 1972 when she attempted to avoid the fire that had engulfed the Rault Center in New Orleans, Louisiana by jumping from the fifteenth floor of the building. United Press International (UPI) published a story on the fire that mentioned Jannas' death. The article described Jannas as seven months pregnant, when in fact she was neither married nor pregnant at the time. Royce and Mamie McBeth, her parents, sued United Press International for defamation. They brought the action on behalf of Victor R. Vince, Jannas'

minor son. Additionally Royce McBeth sued as administrator of her estate. The District Court dismissed the complaint as to both causes of action. For the reasons outlined below, we affirm.

[1] Louisiana law governs the disposition of this diversity case. Since that state has no statute specifically governing defamation actions, the suit arises under the general tort article, La.Civ. Code Art. 2315 (1971). That Article contains specific provisions relative to survival of tort actions. It provides: "The right to recover all other damages [other than property damages] caused by an offense or quasi offense, if the injured person dies, shall survive . . . in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children. . ." The statute's plain language shows that the defamation action does not survive to the estate of Jannas McBeth. The trial judge properly dismissed the complaint of Royce McBeth in his capacity as administrator.

[2-5] The Complaint also avers that publication of the statement in question "visited great damage, embarrassment, humiliation, chagrin on Victor R. Vince . . ." Thus Victor, through his grandparents, seeks to sue in his own right. Under Louisiana law, the plaintiff in a defamation action must establish four elements to prevail: (1) publication; (2) falsity; (3) actual or implied malice; (4) injury. See Fontenot v. Fontenot, 235 La. 488, 104 So.2d 431 (1958); Lazar v. Gremillion, 189 So.2d 35 (La.App. 1966); Cox, Defamation: A compendium, 28 La.L.Rev. 82 (1967). UPI apparently concedes that the publication and falsity requirements are met here. Since the allegations in the Complaint must be taken as true, the damage element is also satisfied. However the Complaint fails to allege malice. Instead it asserts that UPI published the false statement

"[t]hrough neglect, inattention and carelessness." We recognize that Louisiana courts resolve doubts about the Complaint in favor of trial on the merits. Fontenot v. Fontenot, supra; Martin v. The Picayune 115 La. 979, 40 So. 376 (1906). However where the allegedly defamatory statements are not libelous or slanderous per se, Louisiana courts require an allegation of malice. *Cf.* Smith v. Lyons, 142 La. 975, 77 So. 896 (1918).

[6, 7] Failure to allege malice is not the only barrier to the cause of action on behalf of Victor R. Vince. The tort action of defamation is personal to the party defamed. See W. Prosser, The Law of Torts § 111 (4th ed. 1971). The general rule precludes a person from recovering for a defamatory statement made about another, even if the statement indirectly inflicts some injury upon the party seeking recovery. See W. Prosser, The Law of Torts § 111 (4th ed. 1971); 50 Am.Jur. 2d, Libel and Slander § 211; Annot., 132 A.L.R. 891 (1941). The statement at issue here contains no direct reference to Victor R. Vince. While we have found no Louisiana cases directly covering the point, we feel that Louisiana courts would follow the general rule.

For the reasons stated above, the District Court properly dismissed the complaint for failure to state a claim on which relief could be granted.

Affirmed.[1]

---

[1] Our disposition of the case makes it unnecessary to consider the effect of the recent Supreme Court decision in Gertz v. Robert Welch, Inc., ____ U.S. ____, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) on the Louisiana law of defamation relative to events of public interest. See Francis v. Lake Charles American Press, 262 La. 875, 265 So.2d 206 (1972).

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term 1974

No. 74-2359
Summary Calendar

D. C. Docket No. CA 73-2904 "A"

ROYCE and MAMIE McBETH,
Plaintiffs-Appellants,

versus

UNITED PRESS INTERNATIONAL, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under sub-

mission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

December 30, 1974

Issued as Mandate: Jan. 21, 1975

SUPREME COURT, U. S.

FILED

APR 25 1975

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1226

ROYCE AND MAMIE McBETH,
Petitioners

versus

UNITED PRESS INTERNATIONAL, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	PAGE NO.
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

PAGE NO.

American Law Reports -
132 ALR 891---------- 10

Corpus Juris Secundum -
53 CJS §11---------- 8

Harper & James, The Law of Torts,
§5.3 (1956)---------- 9

Prosser on Torts, §92 (2d ed.
1955)---------- 9

Restatement of Torts, §560---- 9

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

ROYCE AND MAMIE McBETH,
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versus

UNITED PRESS INTERNATIONAL, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

United Press International, Inc. respondent herein, respectfully prays that the application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 30, 1974 be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 505 F. 2d 959 and is accurately printed at Appendix "A" to the Petition.

A copy of the judgment and mandate is accurately printed at Appendix "B" to the Petition.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Petitioners' statement of questions presented for review is not completely accurate, and is more properly stated as follows:

(1) Whether the Court of Appeal for the Fifth Circuit was justified in affirming the district court's summary

dismissal of plaintiff- petitioners' action, because of plaintiffs-petitioners' failure to even allege one of the essential elements of defamation under Louisiana law, i.e., malice.

(2) Whether the Court of Appeal for the Fifth Circuit was justified in affirming the district court's summary dismissal of plaintiffs-petitioners' action because under Louisiana law that action was personal to the deceased and could therefore not be brought by plaintiffs-petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

This action presents absolutely no Constitutional issues or federal questions and involves purely the interpretation of Louisiana law.

STATEMENT OF THE CASE

On November 29, 1972 United Press

International, Inc., hereinafter referred to as U.P.I., published on its wire service a story covering the fire that had engulfed the Rault Center in New Orleans, Louisiana. That article contained an inadvertent clerical error in the form of a statement that Jannas McBeth, one of the women who jumped to her death from the Rault Center, was seven months pregnant at the time of said fire and her death. In fact she was neither pregnant nor married. She had been married, but was single at the time of the fire and her death, and was survived by a 14 year old son. This diversity suit was brought on behalf of both her minor son and her estate. The District Court granted UPI's motion for summary judgment dismissing the case. On appeal, the Court of Appeals of the

Fifth Circuit affirmed the District Court, and held as follows:

(1) That under Louisiana law, a defamation action does not survive the decedent's estate;

(2) That the complaint was properly dismissed from the District Court for failure to allege malice;

(3) That the action was properly dismissed in the District Court as to the minor son because the tort action of defamation was personal to the party defamed.

ARGUMENT

Petitioners raise two contentions in support of their application for certiorari, both relating solely to an interpretation of Louisiana law. Because no Constitutional issues or federal questions are presented, and because no other unusual or significant issues are present herein, the application for certiorari must be denied.

I.

Petitioners first contend that the Court of Appeal for the Fifth Circuit erred in finding that the failure to allege malice in the complaint justified dismissal of the action. Under Louisiana law the allegation of malice (and proof thereof) is one of the elements necessary to even state a cause of action for defamation. Because failure to even allege that element would preclude the introduction of evidence thereon, the Court of Appeal properly affirmed the district court's summary of the action. The question of what elements a state might require of a plaintiff in order to present an actionable cause in defamation has no Constitutional or federal ramifications whatsoever; indeed if a state chose to not even recognize

an action in defamation no federal issue would be raised. Petitioners quite simply failed to even allege the presence of one of the prerequisites necessary to maintain their action, and dismissal was clearly mandated.

This case does not involve a mere failure to allege sufficient factual information to satisfy the "fact pleading" system utilized in Louisiana; it is the more basic failure to even allege that one of the essential elements of a cause of action in defamation is present. For that reason alone the action taken by the Fifth Circuit was completely proper.

II.

As completely separate, independent and wholly-sufficient grounds for affirming the district court's summary dis-

missal of this action, the Court of Appeal for the Fifth Circuit also found that Louisiana law would not permit a defamation action to be brought on behalf of any person or entity other than the person actually defamed, since that action would be strictly personal to the party allegedly injured by the publication. Thus, even if the publication in question were defamatory, which it was not, no action would lie.

It is black letter law that the alleged defamation of a deceased creates no civil action whatsoever. The editors of C.J.S. state that the

> "maligning of the memory of a deceased person does not give rise to a cause of action for damages in favor of his relatives where it does not affect their reputation."
>
> 53 C.J.S. Libel and Slander, §11 at page 53.

Professor Prosser observes:

> "Any living person may be defamed. The civil action is personal to the plaintiff, and cannot be founded on the defamation of another. . . Likewise, no civil action will lie for the defamation of one who is dead, unless there is a reflection upon those still living, who are themselves defamed. Statutes in several states have made defamation of the dead a crime, but they are construed to create no civil action." (Emphasis added)
>
> Prosser on Torts, §92 at page 578 (2d ed. 1955).

Harper & James specifically declares that

> "only a living person can be defamed. While the memory of the dead may be desecrated and this may amount to a crime, there can be no defamation of the dead under the common law principles of defamation." (emphasis added)
>
> 1 Harper & James, The Law of Torts, §5.3 at page 361 (1956).

And the Restatement of Torts recites:

> "One who falsely, and without a privilege to do so, publishes

> defamatory matter of a deceased person is not liable either to the estate of such person or to his descendants or relatives." Restatement of Torts, §560.

See also the legion cases collected in 132 ALR 891, 892 disallowing civil defamation actions by surviving family members of the person allegedly defamed.

The law of Louisiana is completely in accord with the foregoing principles, as was demonstrated at great length by respondent herein to, and as was fully considered by, the Court of Appeal for the Fifth Circuit, and any dispute to the contrary that petitioners might have would be directed solely to that Court's interpretation of state law, not to any Constitutional or other federal question.

CONCLUSION

For the reasons stated above,

Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BY_____
ROBERT E. WINN
ATTORNEYS FOR RESPONDENT, UNITED PRESS INTERNATIONAL, INC.

PROOF OF SERVICE

I, Robert E, Winn, attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing brief in opposition to petition for certiorari on:

Donald V. Organ
427 Gravier Street
New Orleans, Louisiana 70130

_____
ROBERT E. WINN

April _____, 1975.